

<b>RBS Fin. v Montalbano</b>
2015 NY Slip Op 31535(U)
July 30, 2015
Supreme Court, Queens County
Docket Number: 27725/2010
Judge: Robert J. McDonald
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SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. ROBERT J. McDONALD  
Justice

IAS PART 34

- - - - - x

RBS FINANCIAL,  
  
Plaintiff,  
  
- against -

Index No.: 27725/2010  
Motion Date: 5/27/15  
Motion No.: 176  
Motion Seq.: 1

NUNZIA MONTALBANO, SALVATORE  
MONTALBANO, METROPOLITAN MORTGAGE  
COMPANY, JAGUAR 527 INC. C/O STEVEN F.  
NESHEIWAT, ESQ., UNITED STATES OF  
AMERICA, BOARDWALK REGENCY CORP., NEW  
YORK CITY ENVIRONMENTAL CONTROL BOARD,  
NEW YORK CITY DEPARTMENT OF FINANCE-  
PARKING VIOLATIONS BUREAU, "JOHN DOE"  
AND "JANE DOE" said names being  
fictitious, it being the intention of  
plaintiff to designate any and all  
occupants of premises being foreclosed  
herein,

Defendants.

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The following papers numbered 1 to 11 on this motion:

	<u>Papers Numbered</u>
Plaintiff's Notice of Motion-Affirmation- Affidavit(s)-Service-Exhibit(s)	1-4
Defendants Montalbano's Affirmation in Opposition- Affidavit(s)-Exhibit(s)	5-8
Reply Affirmation-Exhibit(s)	9-11

In this mortgage foreclosure action, plaintiff moves for an order striking the answer of defendants Nunzia Montalbano and Salvatore Montalbano; granting plaintiff summary judgment; ordering that the caption in this action be modified, substituting Nationstar Mortgage, LLC as party plaintiff pursuant

to CPLR § 1018; amending the caption by deleting "John Doe" and "Jane Doe" as defendant and ordering that the complaint be amended, nunc pro tunc pursuant to CPLR § 2001; and, appointing a referee to compute the amounts due plaintiff in that defendants have no valid defense to the cause of action and no triable issue of fact exists.

Defendants Nunzia Montalbano and Salvatore Montalbano submit an affirmation in opposition and plaintiff submits a reply.

This action is to foreclose a mortgage covering and pertaining to property located in Queens County, dated August 13, 2007, executed by Nunzia Montalbano and Salvatore Montalbano to secure the sum of \$637,500.00, recorded in the Office of the New York City Register on September 7, 2007 in CRFN 2007000460042. The Mortgage was assigned to plaintiff RBS Financial by Assignment of Mortgage from Greenpoint Mortgage Funding, Inc. recorded in the Office of the New York City Register on May 12, 2010 in CRFN 2010000148887 prior to the filing of the summons, complaint and notice of pendency.

Plaintiff maintains that since the commencement of this action, the mortgage and note were further assigned by plaintiff RBS Financial to Nationstar Mortgage by Assignment of Mortgage recorded in the Office of the New York City Register on May 28, 2014, in CRFN 2014000182519.

Plaintiff filed a summons, complaint and notice of pendency on November 3, 2010. Defendant Nunzia Montalbano and Salvatore Montalbano interposed an answer on or about November 16, 2010.

Pursuant to the answer filed by defendants Nunzia Montalbano and Salvatore Montalbano, it was alleged that discrepancies existed between the complaint and the terms of the Note.

i. The obligee is alleged to be Mortgage Electronic Registration System, Inc. as nominee for Greenpoint Mortgage Funding, however, the indorsed-in-blank Note is made payable to Greenpoint Mortgage Funding, Inc.

ii. The obligors are alleged to be Nunzia Montalbano and Salvatore Montalbano, however the sole obligor under the Note is Nunzia Montalbano.

iii. The initial monthly payment is alleged to be \$5,503.17 however a review of the Note reveals that the initial principal and interest payment was \$4,648.44.

Plaintiff maintains that the note is indorsed in blank

making it a bearer instrument (UCC § 3-204(s)). Plaintiff further maintains that the typographical errors indicated by defendants are not fatal or prejudicial defects and can be amended pursuant to CPLR § 2001.

In support of plaintiff's motion for an order of reference, plaintiff submits a copy of the note; mortgage assignments including the Recording and Endorsement Cover Page of the assignment from RBS Financial Products to Nationstar Mortgage, LLC recorded in CRFN 201400018219; 30 day demand letter; 90 day RPAPL § 1304 notice; the summons, complaint and notice of pendency; affidavits of service; affidavits of mailing; notices of appearance; OCA affirmation; defendants' answer and residential foreclosure conference order.

Defendants submit opposition to the motion maintaining that the bank does not have standing to foreclose; that there is no proof the note exists; there is no proof from assignor to assignee; that a statement by someone other than one with personal knowledge or with the capacity to review the original and the assignors records is not sufficient. Moreover, defendants contend that plaintiff has not proven that it has standing by failing to submit proof that it was the holder of the note and mortgage at the time the action was commenced.

Submitted by plaintiff is the Recording and Endorsement Page assigning the mortgage from Greenpoint Mortgage Funding, Inc. to RBS Financial, recorded on May 4, 2010 in CRFN 201000014887. The summons, complaint and notice of pendency were filed on November 3, 2010. Subsequently the mortgage was assigned to Nationstar Mortgage LLC on May 28, 2014 in CRFN 2014000182519.

Plaintiff further submits the Affidavit of Ms. Summerville, Document Execution Specialist for Nationstar Mortgage LLC which states that Ms. Summerville has personal knowledge of the facts by virtue of her position at Nationstar; that computer records are created and maintained in the regular course of its business as loan servicer; the records also include the records of RBS Financial, the prior loan servicer of the mortgage loan; that at the time the action was commenced the plaintiff was the holder of the indorsed in blank Note; that the mortgage loan is in default and was due for the December 1, 2009 payment; that a demand letter was mailed to Nunzia Montalbano on February 2, 2010 advising defendant of her default; that a 90 day notice was mailed to defendants on July 29, 2010.

Ms. Summerville maintains that the 90 day notice was sent by certified mail pursuant to RPAPL § 1304 and that all notices are

in compliance with RPAPL 1303.

It is well settled that a plaintiff in a mortgage foreclosure action establishes a prima facie case of entitlement to summary judgment through submission of proof of the existence of the underlying note, mortgage and default in payment after due demand (see Witelson v. Jamaica Estates Holding Corp. I, 40 AD3d 284 [1<sup>st</sup> Dept. 2007]; Marculescu v Ouanez, 27 AD3d 701 [2d Dept. 2006]; US. Bank Trust National Assoc. v Butti, 16 AD3d 408 [2d Dept. 2005]; Layden v Boccio, 253 AD2d 540 [2d Dept. 1998]; State Mortgage Agency v Lang, 250 AD2d 595 (2d Dept. 1998)). Upon such a showing, the burden shifts to the defendant to produce evidence in admissible form sufficient to raise a material issue of fact requiring a trial.

"Where the plaintiff is not the original lender and standing is put into issue, the plaintiff seeking summary judgment must also provide evidence that it received both the mortgage and note by a proper assignment, which can be established by the production of a written assignment of the note or by physical delivery to the plaintiff of the mortgage and note" (Midfirst Bank v. Agho, 121 A.D.3d 343 [2d Dept. 2014] [internal citations omitted]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers, (see Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]).

It is well settled that "[i]n a mortgage foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced." (U.S. Bank, N.A. v. Collymore, 68 AD3d 752, 753 [2d Dept 2009]; see also Aurora Loan Svcs., LLC v Weisblum, 85 AD3d 95, 108 [2nd Dept 2011].) "Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation." (U.S. Bank v. Collymore, 68 AD3d at 754.) Thus, "an assignment of a note and mortgage need not be in writing and can be effectuated by physical delivery." (Bank of New York v. Silverberg, 86 AD3d 274, 280 [2nd Dept 2011].)

Further, a transfer of a mortgage without assignment of the underlying note or bond is a nullity. (U.S. Bank, N.A. v. Collymore, 68 AD3d at 754; Bank of New York v. Silverberg, 86 AD3d at 280.) Conversely, "[a]s a general matter, once a promissory note is tendered to and accepted by an assignee, the mortgage passes as an incident to the note." (Id. at 280; Mortgage Electronic Registration Sys., Inc. v. Coakley, 41 AD3d

674 [2nd Dept 2007].) A party does not have standing to bring a foreclosure action where it is listed as the mortgagee but was never the actual holder or assignee of the underlying note. (Bank of New York v. Silverberg, 86 AD3d at 275.)

Plaintiff asserts, contrary to the defendant's contention, that it has standing to bring the action by submission of the Recording and Endorsement of the Mortgage Assignment from Greenpoint Mortgage Funding Inc. to RBS Financial in CRFN 2010000014887 on May 4, 2010. Moreover, the affidavit of Ms. Summerville states that Nationstar is currently in possession of the Note. Plaintiff's counsel maintains in his affirmation in support that the Note is indorsed in blank making it a bearer instrument (UCC § 3-204(2) ["(a) note payable to bearer and may be negotiated by deliver alone until specially indorsed"]). Counsel asserts that based upon the evidence submitted the plaintiff has made a prima facie showing that it is entitled to summary judgment and an order appointing a referee to compute.

Plaintiff has established a prima facie entitlement to foreclose on a mortgage, by demonstrating the existence of the mortgage and note, ownership of the mortgage, and the defendants' default in payment (see, Campaign v. Barbra, 23 AD3d 327 [2d Dept 2005]; First Trust National Association v. Pinter, 264 AD2d 464 [2d Dept 1999]).

The defendant has made several allegations regarding the invalidity of the mortgage and note assignment, including discrepancies between the complaint and note; and, plaintiff's failure to comply with RPAPL § 1304.

This Court finds plaintiff has established a prima facie entitlement to foreclose on the mortgage and that the conclusory allegations set forth by defendants are insufficient to defeat the motion for summary judgment.

Accordingly, plaintiff's motion to strike defendants' answer and for summary judgment; for an order modifying the caption, substituting Nationstar Mortgage, LLC as party plaintiff pursuant to CPLR § 1018; amending the caption by deleting "John Doe" and "Jane Doe" as defendants and ordering that the complaint be amended, nunc pro tunc pursuant to CPLR § 2001; and, appointing a referee to compute the amounts due plaintiff is granted.

Order signed contemporaneously herewith.

Dated: Long Island City, NY  
July 30, 2015

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ROBERT J. McDONALD  
J.S.C.